81-2400

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ALEXANDER L. STEVAS,
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NO. _____

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1982

CAPITOL AGGREGATES, INC.,

Petitioner

vs.

RAYMOND J. DONOVAN, SECRETARY
OF LABOR, AND FEDERAL MINE
SAFETY AND HEALTH REVIEW COMMISSION,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

1. Did Congress intend in §801(f) of the Federal Mine Safety and Health Act ("the Act") to declare that all mines affect commerce as a class of activity, and thereby relieve the Respondent Secretary of Labor ("the Secretary") of the burden of proving that the products or operations of a mine affect commerce within the meaning of §803 of the Act?

2. If Congress intended §801(f) to declare that all mines affect commerce as a class of activity, and to thus declare jurisdiction to exist as a matter of law over all mines, then did Congress have a rational basis for declaring jurisdiction over surface quarries?

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DESIGNATION OF CORPORATE RELATIONSHIPS

Pursuant to Supreme Court Rule 28.1, CAPITOL AGGREGATES, INC., filing this PETITION FOR WRIT OF CERTIORARI as Petitioner in this proceeding, states that:

This is its original Designation of Corporate Relationships.

H. B. Zachry Company is the parent company of Capitol Aggregates, Inc.

Capitol Aggregates, Inc. does not have an ownership interest in any subsidiaries.

The affiliates of Capitol Aggregates, Inc. are:

1. Bexar Equipment Company
2. Bexar Exporting, Inc.
3. Canyon Creek Railway, Inc.
4. Capitol Aggregates, Inc.
5. Concrete Development Corporation
6. Construction Modules, Inc.
7. Francitas Gas Company
8. Metropolitan General Hospital, Inc.
9. Metropolitan Medical Center, Inc.
10. Metropolitan Professional Building, Inc.
11. Navarro Auto Park, Inc.
12. Palacio Del Rio, Inc.
13. Pecos Valley Southern Railway, Inc.
14. Pecos Valley Southern Transport Company
15. Southern Pecan Land, Inc.
16. Telpole Company
17. Tower Data, Inc.
18. Tower Ventures, Inc.
19. Trans-Pecos Materials, Inc.
20. Vista Verde Company (dormant)
21. H. B. Zachry Company (Caribbean) (formerly H. B. Zachry Company of Puerto Rico)
22. H. B. Zachry Company (International) (formerly Zachry International Puerto Rico)
23. H. B. Zachry Company (Overseas)
24. Zachry Construction Ltd. (Canadian Corporation)
25. Zachry de Mexico SA de CV Constructora (dormant)
26. The Zachry Foundation

27. H. B. Zachry Foundation for Research and Education
28. Zachry, Inc.
29. Zachry Industries, Inc.
30. Zachry International, Inc.
31. Zachry Mining Company
32. Zachry Overseas Construction Ltd. (United Kingdom Corporation)
33. Zachry of San Antonio, Inc.
34. Zachry Saudi Arabian Contracting Co. Ltd.
35. Zachry of Texas, Inc.
36. Zachry of Thailand, Inc. (dormant)

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RAYMOND J. DONOVAN, SECRETARY
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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT REGARDING OPINIONS BELOW

The decision of the Administrative Law Judge (ALJ) (App. A, infra, pp. A1 - A16) is reported at 1980 OSHD ¶24,589 (1980). The decision of the Federal Mine Safety and Health Review Commission (App. A, infra, pp. A17 - A27) is reported at 1980 OSHD ¶25,550; 2 FMSHRC 1040 (1981). The opinion of the United States Court of Appeals for the Fifth Circuit is unreported (App. A, infra, pg. A28).

JURISDICTIONAL GROUNDS IN THIS COURT

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on March 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1966).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U. S. CONST.art. 1, §8, cl. 3.

> [The Congress shall have Power...]
> to regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes;
> ... .

2. 30 U.S.C. §801(f)

> [Congress declares that ...]
>
> (f) the disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused

diseases unduly impedes and burdens commerce;...

3. 30 U.S.C. §802(b)

(b) 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same State but through a point outside thereof;

4. 30 U.S.C. §803

Each coal or other mine, the products of which enter commerce, or

the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this chapter.

STATEMENT OF THE CASE

Petitioner, CAPITOL AGGREGATES, INC., is a corporation primarily engaged in the manufacture of bulk cement and ready-mix concrete, and the quarrying of limestone, sand and gravel in the State of Texas. Petitioner mines limestone from a quarry in San Antonio, Texas. Petitioner also mines sand and gravel from a quarry in Austin, Texas. Petitioner's products are not sold outside the State of Texas.

In May, 1978, the quarries were inspected by Mine Safety and Health Administration (MSHA) Inspectors. As a result of these inspections, several citations were issued to Petitioner, alleging violations of the Mine Safety and Health Act, 30 U.S.C. §801, et. seq. (Supp. 1977), hereinafter referred to as "the Act". Petitioner contested each of the citations, which were heard by the Honorable Charles C. Moore, Jr., Administrative Law Judge ("ALJ") in two separate hearings.

Petitioner specifically objected to the jurisdiction of the Federal Mine Safety and Health Review Commission ("the Commission") because Petitioner's products do not enter commerce, and Petitioner's products and operations do not otherwise affect

commerce. Petitioner does not sell its products beyond a 200 mile radius of its quarry operations in San Antonio and Austin, Texas. On August 27, 1980, the ALJ ruled solely on the basis of evidence that Petitioner sold its mine products intrastate that Petitioner was subject to the Commission's jurisdiction under the Act and upheld violations alleged in some of the citations. (Several of the citations were settled as to the facts and penalty, subject to a final determination of Petitioner's jurisdictional objection.) The issue of federal jurisdiction was timely raised by Petitioner before the case was submitted to the ALJ and has continuously been raised on appeal.

Petitioner submitted to the Commission a Petition for Review of the

ALJ's decison. The Commission affirmed the ruling that jurisdiction existed.

The Petitioner timely submitted to the United States Court of Appeals for the Fifth Circuit a Petition for Review pursuant to the Act, 30 U.S.C. §816 (1971). After oral argument of the case, the Fifth Circuit affirmed the Commission's decision.

Because a substantial federal question is involved regarding federal jurisdiction over a wholly intrastate mine operator, the Petitioner submitted this Petition for Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

REASONS FOR GRANTING THE WRIT

1. Congress did not intend by §801(f) of the Act to declare jurisdiction to exist over all mines as a class

of activity, thereby relieving the Secretary of the burden of proving that Petitioner's mine products or operations affected commerce within the meaning of §803 of the Act.

Congressional authority to regulate Petitioner's activities under the Act is derived from the interstate commerce clause of the Constitution of the United States (U.S. CONST. art. 1, §8, cl. 3) which provides Congress may regulate commerce among the several states. Petitioner is not subject to jurisdiction under the Act because: (1) Petitioner's products do not enter interstate commerce, (2) Petitioner's products have not been shown by any substantial evidence to affect commerce, and (3) Petitioner's mine operations have not been shown by any substantial

evidence to affect interstate commerce.

Congress has specifically defined a category of mines which are subject to the Act:

> "Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act."
> 30 U.S.C. §803 (Supp. 1977)

The term "commerce" as used in the Act is defined to mean commercial intercourse between states:

> "For the purposes of this Act, the term...
>
> (b) 'commerce' means trade, traffic, commerce, transportation, or communication among the several states, or between a place in a state and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same state but through a point outside thereof;..."

30 U.S.C. §802(b) (1977)

Clearly, §802(b) and §803 show that Congress contemplated some mines might not engage in or otherwise affect interstate commerce, and therefore should not be subject to the Act. Thus, Congress obviously did not intend to cover within its jurisdiction any mine which was not subject to the Act under §803. Accordingly, Congress could not have intended to relieve the Secretary of his burden of proving jurisdiction under §803 when an objection to the jurisdiction is raised.

2. Jurisdiction Can Not Be Exercised Over Petitioner Under a"Class of Activities" Theory Because There Was No Rational Basis for Congress' Declaration of Jurisdiction in §801(f) of the Act.

The record below contains no evidence that Petitioner's quarry operations or products affect commerce. The only relevant fact in evidence was that Petitioner sells its products intrastate. [ALJ Decision, Appendix pp. A-3,4.] Therefore, the Secretary has relied upon the "class of activities" theory as applied to §801(f) of the Act. Petitioner believes this theory does not support the Secretary's case.

The "class of activities theory" involves the broadest exercise of the commerce power available to Congress. This theory, in the opinion of the Secretary, holds that Congress may simply declare an activity to affect commerce [as in §801(f) of the Act] and thereby conclusively establish juris-

diction over every member of the class, even if a member operates only intrastate and does not actually affect commerce. Stated another way, the Secretary would insist that jurisdiction exists as a matter of law under §801(f) of the Act, and therefore no proof of an affect on commerce was necessary to acquire jurisdiction over Petitioner.

However, the Court has consistently ruled that such a declaration can be properly made only where a rational basis for such a declaration is clearly supported by the congressional record. [Cases cited infra.] If Congress were not required to find and document a rational basis for declaring the existence of an affect on commerce, it could assume jurisdiction over any activity at will, a power clearly beyond

the confines of the commerce clause of the Constitution (U. S. CONST., art. 1, §8, cl. 3).

The ALJ relied upon the "class of activities" rationale as applied in Marshall v. Bosack, 463 F. Supp. 800 (E.D. Penn. 1978); Heart of Atlanta Motel, Inc., supra; Fry, supra; Katzenbach v. McClung, 379 U.S. 294, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964); United States v. Darby; 312 U.S. 100 61 S. Ct. 451, 85 L. Ed. 609 (1940); Perez v. United States, 402 U.S. 146, 91 S. Ct. 1357, 28 L. Ed. 686 (1971). These cases involved a variety of nationwide regulatory schemes. Each of the cases have upheld jurisdiction to regulate a class of activities because the Court, after reference to the congressional record, found documented evidence that it was

reasonable for Congress to declare that a class of activity affects or impedes commerce. See Perez, Heart of Atlanta, Katzenbach, Darby, all supra; see also Usery v. Lacy, 628 F.2d 1286, 1229 (9th Cir. 1980).

The "mere fact that Congress has said when a particular activity shall be deemed to affect commerce does not preclude further examination...". Katzenbach, supra, 379 U.S. at p. 303. Such an examination involves a judicial determination of whether Congress had a rational basis for broadly declaring that the regulated activity affects commerce. Perez, supra; United States v. Vignola, 464 F.Supp. 1091, 1098 (E.D. Penn. 1979). To be a reasonable exercise of Federal jurisdiction over class members who do not individually affect

commerce, Congress must clearly demonstrate that the activity sought to be regulated necessarily has an impact on the regulation of interstate commerce that justifies the imposition of Federal regulation:

> "The activities that are beyond the reach of Congress are 'those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purposes of executing some of the general powers of the government.' Gibbons v. Ogden, 9 Wheat. 1, 195, 6 L.Ed. 23 (1824). This rule is as good today as it was when Chief Justice Marshall laid it down almost a century and a half ago."
> Katzenbach, supra, 379 U.S. at 304.

In the case of the Mine Safety and Health Act, close examination of the congressional record shows there was no

rational basis for asserting jurisdiction over surface quarry operations under §801(f).

The 1977 Act basically only amended the Federal Coal Mine Safety and Health Act of 1969 to apply to "other" mines, and repealled the provisions of the Federal Metal and Nonmetallic Mine Safety Act of 1966 ("Metal Act"), which theretofore had regulated surface mines. See U. S. Code Cong. & Admin. News, 95th Cong., 1st Sess., p. 3401, et. seq. (1977). The intent of Congress was to extend the regulation of the hazardous coal mining industry to all mining activities. Joint Explanatory Statement of the Committee of Conference, House Conf. Rep. 95-655, 95th Cong. 1st Sess. (1977), reprinted in U. S. Code Cong. & Admin. News, p. 3485. In fact, the

declaration in §801(f) of the current Act is the same declaration used in the Coal Mine Safety and Health Act of 1969, 30 U.S.C. §801, et seq. (1969), repealled, 30 U.S.C. §801 et seq. (Supp. 1977), with the sole exception of the modified reference to "other" mines.

Regardless of whether Petitioner may have had a burden to show the absence of any rational basis for the jurisdictional declaration in §801(f) of the Act, a review of the legislative history of both the 1977 Act and the 1966 Metal Act clearly illustrates on its face that Congress did not have a rational basis to summarily extend jurisdiction to regulate all surface quarries within the class of mines.

Noting that an injury rate of "19.61" was "well above average", a 1966

Senate committee report showed quarries had the lowest injury frequency rate (which was well below average), after underground coal, mining, underground non-coal mining, construction, lumber, air transport, leather, and transit. S. Rep. No. 1296, 89th Cong., 2nd Sess. (1966), reprinted in U.S. Code Cong. & Admin. News, at 2847.

The repealled Metal Act also required the Secretary to record "violations reported and safety practices in the sand and gravel industry." See S. Rep. No. 1296, 89th Cong., 2d Sess. (1966), reprinted in U.S. Code Cong. & Admin. News, at 2852. Despite this significant data collection requirement, nowhere in the legislative history of the 1977 Act does it indicate that Congress may have relied on or even

referred to such reports in extending jurisdiction to all surface mines.

The reported views of Senators Paul Fannin, Jacob Javitz and Peter Dominick during consideration of the 1966 Metal Act reflect their objections that certain mining operations should not be regulated by Congress. Senator Fannin stated:

> "Because of the nature of the operations in the gravel and sand industry, therefore, it would be inappropriate to include the industry under a Federal law which is designed to regulate safety in the mining industry. It is best regulated by existing State and local codes applicable to manufacturing and construction operations which contain hazards similar to those encountered in the gravel and sand industry."

See S. Rep. No. 1296, 89th Cong., 2d Sess. (1966), reprinted in U.S. Code Cong. & Admin. News, at 2874.

Recognizing the generally small size of sand and gravel operations, Senator Fannin emphasized that the sand and gravel industry did not have the same hazards as the coal industry:

> "In the sand and gravel industry there are approximately 6,000 plants located in the United States which produce commercial sand and gravel. Almost 60 percent of these plants produce less than 50,000 tons of material per year. The average plant employs only seven men, and many of these operations employ only one or two men. In other words, in the sand and gravel industry, there are no large individual plants in terms of personnel exposed to catastrophic hazards."

See S. Rep. No. 1296, 89th Cong., 2d Sess. (1966), reprinted in U.S. Code Cong. & Admin. News at 2874.

Lacking any rational basis for extending jurisdiction to surface quarries, Congress attempted to overcome this obstacle by leaving the exercise of jurisdiction under the 1966 Metal Act to the discretion of the Secretary of the Interior.[1]

---

[1]The applicable provision of the Metal Act was §722(b), now repealled which read "(b) The Secretary may, by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction under this chapter over any class or category of mines where, in the opinion of the Secretary, the effect of the operations of such mines on commerce is not sufficiently substantial to warrant the exercise of jurisdiction under this chapter, and the record of injuries and accidents in such class or category of mines warrants such a declination of jurisdiction."

> "... many sand and gravel pits and comparable crushed stone operations operate for a short period of time, often with respect to a particular job such as highway construction. In these situations, the the Secretary is expected to consider carefully whether his authority to decline jurisdiction should be exercised. He would be expected to exercise his authority to decline jurisdiction if the safety experience warranted it. The Committee would expect the Secretary to give controlling weight to the evidence of hazard in such operations in determining whether jurisdiction should be exercised." S. Rep. No. 1296, Id. at p. 2851-2852.

The legislative history of the Metal Act further demonstrates that Congress' true concern was for safety in underground mines, since it required mandatory inspections only of underground mines. Id. at 2851-52. The Senate subcommittee

which reviewed the legislative proposal for regulation of metal and nonmetallic mines determined:

> "The requirement of annual or more frequent inspections of underground mines is in recognition of the fact that underground mining operations are decidedly the most hazardous of the various operations within the scope of the proposed act..."
> S. Rep. No. 1296, Id. at p. 2851 and 2852.

It is obvious from the congressional record of the 1977 Act that, in declaring that all mining activities affect commerce, Congress acted at best out of absolute uncertainty as to whether non-coal, surface mines presented a sufficient impact on interstate commerce to be regulated as a part of the class of mining activities without requiring specific proof of an affect on

commerce. The record shows Congress' main concern again was the regulation of hazardous coal mines.

The Senate committee report on the 1977 Act contains a chart which was showed the incidence of injuries in the mining industry. See U.S. Code Cong. & Admin. News, 95th Cong., 1st Sess., p. 3406-7 (1977). The chart only has statistics for coal and metal/non-metal mining injuries and fails to break down the non-metal categories to reflect statistics on stone quarries and sand and gravel operations. See U.S. Code Cong. & Admin. News, 95th Cong., 1st Sess., p. 3407 (1977).

The legislative history of the 1977 Act shows that Senator Orrin Hatch, objected to extension of the coal mining statute to all non-coal mines, arguing

that mining disasters prevalent in the coal mining industry do not exist in the non-coal mining industry. See U. S. Code & Cong. Admin. News, 95th Cong., 1st Sess. at p. 3480 (1977). Yet, Congress by its declaration placed the non-coal, surface mining industry under its jurisdiction without establishing the particular need for regulating this segment of the mining industry.

The dissent of Judge Kelleher in Usery v. Lacy, supra, appropriately echoes CAPITOL'S position:

> "... the majority's novel assertion that the nature and breadth of the Constitution's limitations upon the exercise of congressional power are determined by congressional intent in the exercise of such power finds no support in constitutional history. If the majority's assertion were indeed true, the entire constitutional

> basis of judicial review of congressional authority to enact statutes within the confines of its constitutionally-delimited power would evaporate." Id., 628 F.2d at 1231.

3. Capitol's Wholly Intrastate Sales of Mine Products Cannot be Deemed to Affect Interstate Commerce so as to Subject Capitol to the Act under the theory of Wickard v. Filburn.

Since the Secretary cannot rely on the class of activities theory to avoid his burden of proving Petitioner's mine operations or products affect commerce, the Secretary has relied upon the theory of Wickard v. Filburn, 317 U.S. 111,63 S. Ct. 82,87 L.Ed. 122 (1942), to establish jurisdiction on the basis of the only relevant fact in evidence - that Petitioner has sold its mine products intrastate.

In Wickard, jurisdiction to regulate intrastate wheat sales was upheld under the theory that intrastate production and consumption of wheat supplanted sales of wheat from outside the state, directly interfering with the legitimate legislative purpose of controlling the wheat market through exercise of the commerce power. Id., 317 U.S. at p. 127.

In Marshall v. Kilgore, 478 F. Supp. 4 (E.D. Tenn., S.D. 1979), a district court also held intrastate sales of coal satisfied a market demand that could have otherwise been supplied by out of state coal producers, thus sufficiently affecting commerce to warrant the exercise of Federal jurisdiction over a coal mine operator. The rationale of this economic impact theory is found in several other cases. Fry v.

United States 421 U.S. 541, 95 S.Ct. 1792, 44 L.Ed. 2d 363 (1975); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed. 2d 258 (1964); U.S. v. Wrightwood Dairy Co., 315 U.S. 110, 62 S.Ct. 523, 86 L.Ed. 726 (1942). It is apparent from these cases that Petitioner's activities, to be subject to the Act's jurisdiction, must exert an affect on interstate commerce by reason of interdependence, interaction, or overlapping between the geographical product market areas of Petitioner and out-of-state producers. Without proof of interdependence among interstate markets, interdependence the economic impact theory, does not logically apply to Petitioner.

While coal or wheat may be shipped across great distances, the same

cannot be presumed so for Petitioner's mine products. Petitioner established not only that its sales were purely intrastate, but that its mine-related products (cement, aggregate sand and gravel, and ready-mix concrete), unlike coal or wheat, are too heavy to economically transport in excess of 200 miles from its plants, centrally located within the State of Texas in San Antonio and Austin. (Tr. 228, 229) See Featherstone Concrete Products, Inc., 1980 OSHD 24,861, OSHRC Docket No. 79-4944 (1980). In Featherstone, the administrative law judge found the fact that Featherstone delivered it products "within 300 miles" of San Antonio in a state as large as Texas insufficient evidence of an affect on commerce.

There simply is no evidence that Petitioner's customers would seek cement, aggregate or concrete from out of the State of Texas if Petitioner did not supply its local intrastate market area. On the contrary, there is evidence that other cement producers located in San Antonio would supply local demand for this product from local sources. (Tr. 228)

The ALJ could only speculate that Petitioner's sales satisfied a market demand for cement which would otherwise be satisfied by out-of-state sellers of cement. In the absence of such evidence, Petitioner's intrastate sales cannot be deemed to affect interstate commerce under the rationale of Wickard.

On the basis of the evidence developed at the hearings below, prior to Petitioner's motions to dismiss for lack of evidence to support jurisdiction, there was absolutely no evidence to show that Petitioner's products had any affect on interstate commerce. Therefore, the Secretary simply failed to meet his burden of proof of jurisdiction.

CONCLUSION

Congress did not intend to make all mines subject to the Act by its §801(f) reference to a class affect on commerce. Even if Congress intended to declare jurisdiction over all mines as a matter of law, there is no rational basis for the exercise of jurisdiction over Petitioner's wholly intrastate activities simply because Petitioner operates a surface quarry. There is no substantial evidence that Petitioner's products or operations affect commerce. A substantial federal question has been presented here regarding an extension of the commerce power of the Congress over intrastate activities where there is no rational basis for such extension of power. For these reasons it is,

respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Johnston, Krog & Vives
2600 Tower Life Building
San Antonio, Texas 78205
(512) 223-4061

By:
Richard L. Reed

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of June, 1982, true and correct copies of the above and foregoing PETITION FOR WRIT OF CERTIORARI to the UNITED STATES COURT OF APPEALS for the FIFTH CIRCUIT have been served upon the Respondents, Secretary of Labor, Mine Safety and Health Review Commission, and upon the Solicitor General, Department of Justice, by certified mail, return receipt requested, addressed to:

Mr. Dennis D. Clark
General Counsel and
Mr. James A. Lastowka
Deputy General Counsel
Office of the General Counsel
FMSHRC
1730 K Street, N.W.
6th Floor
Washington, D. C. 20006

and

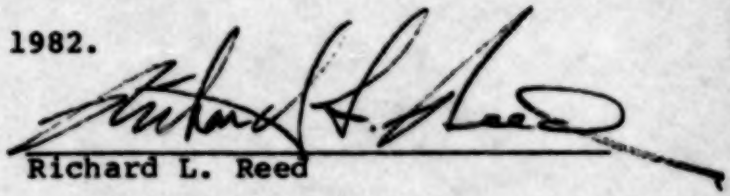
CERTIFICATE OF SERVICE (cont.)

Ms. Nancy Spencer Hyde and
Mr. Michael A. McCord
U. S. Department of Labor
Office of the Solicitor
4015 Wilson Boulevard
Arlington, Virginia 22203

and

The Solicitor General (three copies)
Department of Justice
Washington, D. C. 20530

Pursuant to an extension granted by the Clerk of the Supreme Court, this PETITION FOR WRIT OF CERTIORARI has been revised in conformance with the rules of form of the Supreme Court and is submitted in substitution of the non-conformed Petition earlier filed with the Court on June 17, 1982.



Richard L. Reed

IN THE
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CAPITOL AGGREGATES, INC.,

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RAYMOND J. DONOVAN, SECRETARY
OF LABOR, AND FEDERAL MINE
SAFETY AND HEALTH REVIEW COMMISSION,

Respondents

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceedings
	:	Docket No. DENV 79-163-PM
Petitioner	:	A.O. No. 41-00010-05001
vs.	:	
	:	Capitol Cement Quarry and Plant
CAPITOL AGGREGATES, INC.	:	
Respondent	:	Docket No. DENV 79-240-PM
	:	A.O. No. 41-01792-05001
	:	Pit and Plant No. 4

DECISION

Appearances: Sandra D. Henderson, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Robert W. Wachsmuth, Richard L. Reed, Esqs., San Antonio, Texas, for Respondent.

Before: Administrative Law Judge Charles C. Moore, Jr.

The above cases were remanded to me by order of the Commission dated May 23, 1980, in order to allow the parties to submit posthearing briefs after receiving copies of the transcript of the hearing. Respondent's posthearing brief deals extensively with the question of whether or not the congressional grant of authority in the Federal Mine Safety and Health Act of 1977 was sufficiently broad to confer jurisdiction 1/ over

1/ I am using the term "jurdisdiction" because most of the attorneys and judges have used that term in connection with this problem. Actually "coverage" would be more appropriate because the question is not whether I have jurisdiction over the case but whether a particular mine is covered by the Act. Obviously I have jurisdiction to decide a case brought under the Federal Mine Safety and Health Act, as these cases were, and jurisdiction over the party was obtained when process was served. The effect on interstate commerce is just one of a number of facts that the Government has to prove in order to prevail.

Respondent's operation. It contends in the first place, that it is not a mine subject to the jurisdiction of the Act because its products do not affect interstate commerce and second, that the Secretary failed to submit evidence on this point. Respondent then proceeded to discuss those citations for which penalties were assessed in my decision of April 14, 1980. The Secretary of Labor's brief confined itself to the issue of jurisdiction.

At the time that I denied the motion to dismiss in Docket No. DENV 79-163-PM, the Government had rested and the only actual evidence on the coverage point as distinguished from the usual assumptions, was the following statement in Respondent's answer: "Respondent's sale

of cement is wholly intrastate."

In denying the motion to dismiss, I was in effect ruling that the sale of a mine product in intrastate commerce affected interstate commerce. With respect to Docket No. DENV 79-240-PM which was tried later, it was brought out that the company was a subsidiary of H. B. Zachry and that Respondent sells asphalt to the state of Texas for road building (DENV 79-240-PM, Tr. 55, 57). But in my opinion insofar as DENV 79-163-PM is concerned, the decision must be based on the state of the record at the time the motion was made and denied.

Even though Capitol Aggregates maintains that it is a small producer, that does not preclude it from affecting interstate commerce. In the landmark case of

Wickard v. Filburn, 317 U.S. 111 (1942), a wheat farmer consuming his own wheat was held to affect interstate commerce. Similarly, in Andrus v. Kaskan, et al., C.A. 77-259 (W.D. Pa. 1977) [cited with approval in Marshall v. Kraynak, 457 F. Supp. 907, 910 (W. D. Pa. 1978)], the court held that although the defendant operator sold only 2,000 tons of coal annually to a power company, it affected interstate commerce when its production was combined with the production of all the nation's small privately owned mines. Aggregating the intrastate sales of small producers in order to find a substantial impact on interstate commerce was also used by the court in Marshall v. Bosack, 463 F. Supp. 800 (E.D. Pa. 1978). To

the same effect, see Fry v. United States, 421 U.S. 542, 547 (1975). But the Act does not require that Respondent's effect on interstate commerce be substantial. Section 803 of the Act (30 U.S.C. §803) subjects every mine, "the products of which enter commerce, or the operations or products of which affect commerce" to its coverage so that any affect on commerce will subject Capitol Aggregates to the Act. The "de minimus" doctrine does not apply to interstate commerce. Mabee v. White Plains Publishing Company, 327 U.S. 178, 181 (1945).

Also, the Act states that a certain class of activities, i.e., unsafe mine operations, burden commerce, 30 U.S.C. § 801(f). As stated in Bosack above,

"it makes no difference whether a mine sells all of its coal intrastate since the disruption of coal mine activities in itself is what impedes and burdens commerce." 463 F. Supp. at 801. Where the identification of a class by Congress is a reasonable one, the courts are reluctant to disturb that finding. See United States v. Darby, 312 U.S. 100, 115 (1940); Heart of Atlanta Motel v. United States, 379 U.S. 241, 255, 261-262 (1964); and Katzenbach v. McClung, 379 U.S. 294, 303-304, 305 (1964). And "where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to exise as trivial individual instances of the class." Perez v. United States, 402 U.S. 146,

154 (1970). Also, the Act, as legislation enacted primarily for the purpose of perserving human life, must be interpreted liberally. Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals, 504 F.2d 741 (7th Cir. 1974). 2/

For these reasons, I find that Respon-

2/ In my decision of April 14, 1980 (p. 2), 2 FMSHRC 869, 870, I cited Hammer v. Dagenhart, 247 U.S. 251 (1918), for the proposition that Congress has power to regulate instrumentalities of commerce, which it surely does. One page 13 of its brief, Respondent relies on the same case as holding that Congress lacks power to prohibit the interstate transportation of products manufactured by child labor. The holding regarding Congress' lack of power was clearly overruled in United States v. Darby, 312 U.S. 114, 116 (1940), where the court stated:

"The conclusion is inescapable that Hammer v. Dagenhart was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled."

dent's activities affect interstate commerce, thereby subjecting Respondent to the Act.

In its posthearing brief, Respondent presented agruments concerning those citations for which I assessed penalties in my April 14, 1980, decision. There is nothing in the brief that persuades me that my former opinion should be altered but I do have the following comments.

Citation No. 169697 concerned a failure to post traffic rules at the quarry. I am still of the opinion that one speed limit sign at the entrance to the quarry fails to satisfy the purpose of the standard, which is to periodically remind vehicle drivers of the applicable speed limits and other rules.

Citation No. 169700 was a citation for an undermined coke stockpile. Respondent maintains that the inspector was remiss in failing to conduct a standard "pack test" which would have determined the stockpile's propensity to collapse. In support thereof it cites two OSHA cases; Reliance Universal, Inc., 1975-1976 OSHD 20,027 (1975), and Armor Elevator Company, 1971-1973 OSHD 15,173 (1972). The standard states that stockpile faces shall be trimmed to "prevent hazards to personnel." 30 C.F.R. §56.9-61. It was within the inspector's expertise to determine, based on his visual observation of the stockpile, activities around the stockpile, and the fact that

it was already undermined one foot, that it posed a hazard to personnel in the vicinity. Reliance Universal concerned the failure to test for the presence of flammable vapors which are not observable by the naked eye, and Armor Elevator Company concerned the failure of an inspector to measure the distance and angle of a ladder in order to prove that its position at the time a citation was issued was hazaardous. There is little similarity between those regulations and the regulation before me. My prior finding of violation is reaffirmed.

With respect to Citation No. 169705, inadequate illumination over the coke storage bin, I find Respondent's argument that its maintenance records did not show any malfunction of the lights

unpersuasive and find no reason to disturb my prior finding. If Respondent had produced a witness who saw the light burning the previous night, it might have been a different story.

Citation No. 169706, another illumination violation, is also reaffirmed. In this case, only an electrical outlet was supplied, there were no lights installed in the area aroung the coke crusher and conveyor. I think a hazard would be created rather than allayed were employees required to carry lighting equipment in one hand and repair tools in the other to make repairs in this area at night. Moreover, the standard applies to "all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites" in

addition to work areas. 30 C.F.R. § 56.17-1.

Citation No. 170007 of Docket No. DENV 79-240-PM concerns a malfunctioning backup alarm on a haulage truck. A malfunctioning backup device is as much a violation of the standard as a failure to install any backup warning device in that it fails to promote safety in the fashion specified in the standard. There is no evidence in the record that Respondent regularly inspected the backup alarms on its trucks so that barring any evidence that this is the very first instance in which the backup alarm malfunctioned on this truck, I find that my original assessment in this instance was warranted. The Secretary does not need to prove that Respon-

dent's haul truck is regularly operated in a reverse direction without a backup alarm or the assistance of an observer in order to prove a violation of the standard. The Secretary showed that there was no observer specially appointed to guide the haul truck when backing and that the backup alarm was not operating. Perhaps if the haul truck had no reverse gear I would vacate the citation, but that is not the case here. With respect to the two OSHA cases cited by Respondent, Collier Construction Company, 1973-1974 OSHD 21, 792(1974); and Brown-Johnson Company, 1973-1974 ASHD 21, 832 (1974), those cases are not binding on this forum.

Respondent maintains that the guard-

ing standard violation contained in Citation No. 170010 was an isolated act of employee misconduct and that Respondent should be thereby relieved of liability. But the acts of an employee are imputed to the operator. Ace Drilling Coal Company, 2 FMSHRC 790 (April 24, 1980) PITT 75-1-P, IBMA 76-60; and Jones & Laughlin Steel, 2 FMSHRC 678 (March 11, 1978), PENN 79-145. I was also forced to disregard the testimony of an employee with respect to whether or not the gear was in motion when the doors to the gear housing were opened as he contradicted himself several times. My finding in this instance will remain undisturbed.

My April 14, 1980, decision which was reversed by the Commission and

remanded to me 3/ is hereby reaffirmed and a copy is attached as Appendix I. Respondent is ordered to pay to MSHA within 30 days penalties in the total amount of $215.

3/ After I had issued my decision of Arpil 14, 1980, I learned that although I had received the transcript over two months earlier, the parties had not received copies of the transcript. They had therefore been deprived of the opportunity to submit briefs within 30 days after receipt of the transcript. I attempted to remedy the situation by issuing a stay of my decision, but the Commission ruled that I had no power to stay a decision after issuance. The Commission accomplished the same result, however, by reversing and remanding.

June 24, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. DENV 79-163-PM DENV 79-240-PM
v.	:	
CAPITOL AGGREGATES, INC.	:	

DECISION

This civil penalty case involves the interpretation of 30 CFR §56.17-1, a mandatory illumination standard. In a decision issued on April 14, 1980, the administrative law judge found multiple violations of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979) and assessed penalties. We vacated that decision on procedural grounds, and on remand the judge reaffirmed his prior decision. The operator, Capitol Aggregates, Inc., filed a petition for discretionary re-

view, which we granted in part. For the following reasons, we affirm in part and reverse in part.

On May 17, 1978, an MSHA inspector issued Citation Nos. 169705 and 169706 alleging violations of 30 CFR §56.17-1 in Capitol's cement plant. The standard provides:

> Mandatory.
>
> Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas.

The question in this case is what constitutes "[i]llumination sufficient to provide safe working conditions." Resolution requires a factual determination

based on the working conditions in a cited area and the nature of illumination provided.

Citation No. 169705 alleged a violation of the standard because the lights over the coke storage bin and adjacent walkways were not operable. In concluding that the operator violated the standard, the judge was persuaded by the inspector's unrebutted testimony that the illumination was insufficient. In the absence of negligence, the judge assessed a $25 penalty. On remand, he saw "no reason to disturb [his] previous finding...." We conclude that substantial evidence supports the judge's findings.

The facts are undisputed. The only permanent lighting in a 30-40 foot area was provided by a mercury vapor light

which was not operable at the time of the inspection, about 9:00 p.m. 1/ Electrical outlets, extension cords, and auxiliary lighting were available, however, and workers were equipped with flashlights. There was little reflected light in this coke area. Because the coke storage bin continously supplied coke to the kiln, Capitol's employees might have to make repairs or do maintenance on the bin/kiln system at any time, including the evening shift. The lack of illumination created hazards, such as tripping

1/ This light failed because a photoelectric cell, which normally activated the lamp as the sun went down, malfunctioned. Although Capitol concedes the malfunction, it makes much of its lack of knowledge of the malfunction. Capitol's lack of knowledge relates only to its possible negligence. Because the judge found no negligence, Capitol's knowledge is not at issue here. Nor did we direct that issue for review.

or falling, for employees performing such work.

We reject Capitol's argument that, notwithstanding the failure of the permanent lighting, there was adequate illumination to ensure safe working conditions, because it also provided electrical outlets for portable lighting equipment and flashlights for night work. Portable lighting could satisfy the standard where such lighting is accessible, its use is feasible and safe, and it provides adequate light under the circumstances. That is not the case before us, however.

Capitol states only that it provided such lighting and outlets; it does not indicate where such lighting was stored or how easy it was to reach. Although a

worker could carry a flashlight, extension cord, and auxiliary light in one hand, that practice may be neither safe nor desirable. Capitol concedes that a worker might have to climb a ladder to get to the top of the storage bin. It does not rebut the inspector's testimony that climbing a ladder and performing maintenance or repairs require the use of a worker's hands, and do not leave the hands free for carrying a flashlight or extension cord with auxiliary lights. Nor has Capitol established the adequacy of such portable lighting equipment; it does not show the amount of illumination this lighting would shed. Similarly, Capitol fails to prove that, under these facts, a flashlight provided sufficient illumination. The evidence and the case

law demonstrate otherwise. The inspector testified without contradiction that a flashlight would not provide sufficient light if an employee were simultaneously holding a flashlight and working on equipment. The case law indicates that a directed beam of light such as that supplied by a cap lamp--or, by analogy, a flashlight--may not shed sufficiently diffuse light to provide a safe work area. Clinchfield Coal Co. at 3, March 1979 FMSHRC, 1 MSHC 2027 (Chief Administrative Law Judge Broderick, March 12, 1979, aff'd. sub nom., Clinchfield Coal Co. v. Secretary of Labor, No. 79-1306, 1 MSHC 2337 (4th Cir. 1980) (unpublished). (Clinchfield involved the identical coal standard at 30 CFR §77.207).

In the absence of evidence to the contrary, we are persuaded that the judge properly credited the inspector's testimony that the lighting was inadequate. Clinchfield, supra; J. P. Burroughs and Son, Inc., 2 FMSHRC 3266, 3269, 1 MSHC 1165, 1166 (Chief Administrative Law Judge Broderick, 1980). We hold that, under these facts, the illumination provided by the operator did not satisfy the standard and we thus affirm the judge.

Citation No. 169706 alleged a violation of the standard because there was insufficient illumination in the area under the coke impact crusher, around the tail pulley of the C-58 conveyor belt, and by the tail section of the apron feeder under the coke hopper. The judge found that there were no lights

and concluded that Capitol had violated the standard "[i]nasmuch as miners might have to travel in the area at night." In our view, his finding that miners might have to work in the cited area at night is not supported by substantial evidence. Consequently, we reverse his finding of a violation and vacate the underlying citation.

There was undisputed testimony that, when work was performed in the area during daytime, there was adequate light. The judge impliedly found that the daytime lighting was adequate, and the Secretary does not argue otherwise. Although the inspector testified to his belief that emergency nighttime repairs might be necessary, he did not observe any employees there at night, nor did he testify as to the likelihood of such

nighttime repairs. By contrast, Capitol's witness testified that employees would not have to go into C-58 conveyor area at night because a bypass system provided sufficient fuel storage capacity so that the plant could run all night. Even if the bypass system failed at night, the plant had two addititonal days of fuel and other fuel systems available to substitute for the bypass system; hence any necessary repairs would not have to be made immediately.

Under these facts, we do not believe that substantial evidence supports the judge's finding that employees might have to work in the area at night. We hold that, because there was adequate light for safe working conditions during the day and there was no probability of

work being performed at night, there was no violation of the standard. Accordingly, we reverse the judge and vacate the citation. 2/

/s/ Richard V. Backley
Richard V. Backley, Chairman

/s/ Frank F. Jestrab
Frank F. Jestrab, Commissioner

/s/ A. E. Lawson, Commissioner
A. E. Lawson, Commissioner

/s/ Marian Pearlman Nease
Marian Pearlman Nease, Commissioner

2/ If even some sporadic nighttime work or the probability of nighttime work had been shown, the result might have been different.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-4278

CAPITOL AGGREGATES, INC.,

Petitioner,

versus

FEDERAL MINE SAFETY & HEALTH
REVIEW COMMISSION and the SECRETARY
OF LABOR,

Respondents.

Petition for Review of an Order of
the Federal Mine Safety and Health
Review Commission

(March 19, 1982)

Before WISDOM, POLITZ and TATE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21[1/].

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FILED
AUG 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2400

In the Supreme Court of the United States

OCTOBER TERM, 1982

CAPITOL AGGREGATES, INC., PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, AND FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether regulation of safety practices in sand and gravel surface mining quarries is within the scope of Congress' Commerce Clause power.

2. Whether the Federal Mine Safety and Health Act of 1977 is applicable to petitioner's sand and gravel mining operations.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A28) is not reported. The opinion of the Federal Mine Safety and Health Review Commission (Pet. App. A17-A27) is reported at 3 F.M.S.H.R.C. 1388; the initial decision of the Commission remanding the case to the administrative law judge is reported at 2 F.M.S.H.R.C. 1040. The decision of the administrative law judge on remand (Pet. App. A1-A16) is reported at 2 F.M.S.H.R.C. 2373; the administrative law judge's initial decision is reported at 2 F.M.S.H.R.C. 869.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1982. The petition for a writ of certiorari was filed on July 2, 1982, as of June 17, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner mines sand and gravel in Austin and Del Rio, Texas, and operates a limestone quarry and two cement manufacturing plants in San Antonio, Texas and a cement plant in Austin (Tr. 55, 228-229, 239). Inspectors from the Mine Safety and Health Administration issued citations to petitioner for violations of safety regulations at its Austin sand and gravel quarry and its San Antonio limestone quarry and cement plant operation. The Secretary of Labor thereafter sought administrative assessment of civil penalties. See 30 U.S.C. (Supp. IV) 814(a) and 820.

2. Petitioner moved to dismiss the proceedings on the ground that the Secretary had failed to show that petitioner's operations affected interstate commerce. Petitioner also contested the underlying citations. The administrative law judge denied the motion to dismiss (ALJD 1-2), affirmed six of the citations, and assessed petitioner a total penalty of $215 (ALJD 2-7).[1] Upon discovering that the parties had been unable to file post hearing briefs because they had not received the transcript, the administrative law judge entered an order staying his decision. See Pet. App. A16 n.3.

The Federal Mine Safety and Health Review Commission held that the administrative law judge lacked authority to stay his decision (CD 2).[2] Accordingly, the Commission vacated the stay and the decision on the merits and remanded the case to allow the parties an opportunity to review the transcript and submit briefs to the administrative law judge (CD 2-3).

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[1] "ALJD" refers to the administrative law judge's initial decision, a copy of which has been lodged with the Clerk of this Court.

[2] "CD" refers to the Commission's initial decision, a copy of which has been lodged with the Clerk of this Court.

On remand, the administrative law judge again held (Pet. App. A1-A6) that petitioner's activities affect interstate commerce and are, therefore, subject to regulation under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. IV) 801 *et seq.*

3. Petitioner sought discretionary review before the Commission, which granted review as to two of the citations, but declined to review the judge's denial of the motion to dismiss (Pet. App. A17-A27). The Commission vacated one of the citations (*id.* at A24-A27) and affirmed the other (*id.* at A19-A24).

The court of appeals summarily affirmed (Pet. App. A28).

ARGUMENT

1. Petitioner contends (Pet. 11-27) that regulation of sand and gravel mining is beyond the scope of the Commerce Clause (Article 1, Section 8, Clause 3) because there is no rational basis for Congress' explicit finding that "the disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused diseases unduly impedes and burdens commerce" (30 U.S.C. (Supp. IV) 801(f)). As this Court recently noted, however, "[i]n enacting the [Federal Mine Safety and Health Act of 1977], Congress was plainly aware that the mining industry is among the most hazardous in the country and that the poor health and safety record of this industry has significant deleterious effects on interstate commerce." *Donovan* v. *Dewey*, 452 U.S. 594, 602 (1981). Congress' finding was "based on extensive evidence showing that the mining industry was among the most hazardous of the Nation's industries" (*id.* at 602 n.7).

The loss of income to miners and mine operators as a result of work-related illness and injury directly affects their ability to purchase goods and services and, therefore,

affects the flow of commerce whether the mined product is coal or sand and gravel. Similarly, the disruption of production affects the flow of commerce whether the product is coal or sand and gravel. It is immaterial whether the product of any particular mining enterprise is destined for out-of-state shipment. See, *e.g.*, *Perez* v. *United States*, 402 U.S. 146, 154-157 (1971); *Wickard* v. *Filburn*, 317 U.S. 111, 118-129 (1942). In determining to regulate the safety practices of the mining industry, "Congress appropriately considered the 'total incidence' " of existing practices. *Perez* v. *United States, supra*, 402 U.S. at 154, quoting *Katzenbach* v. *McClung*, 379 U.S. 294, 301 (1964). See *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 276-277, 281 (1981).

The history of the Federal Metal and Nonmetallic Mine Safety Act of 1966, 30 U.S.C. 721 *et seq.*, one of the predecessors of the Federal Mine Safety and Health Act of 1977, confirms the basis for Congress' exercise of power over sand and gravel mines. The Senate Committee on Labor and Public Welfare specifically rejected proposals to exempt sand, gravel, and crushed stone operations from the scope of the statute. S. Rep. No. 1296, 89th Cong., 2d Sess. 6 (1966). Data before the committee concerning the frequency and severity of injuries "conclusively show that the sand and gravel industry is the most hazardous except for the underground coal and mineral mining industries" (*id.* at 7). See *Metal and Nonmetallic Mine Safety: Hearings on H.R. 8989, S. 2972, S. 996, and S. 3094 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 89th Cong., 2d Sess. 130, 211-212 (1966).[3] In 1977,

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[3]It is true that Section 3(b) of the 1966 Act (30 U.S.C. 722(b); emphasis added) authorized the Secretary of Interior to "decline to assert jurisdiction * * * over any class or category of mines where, in the opinion of the Secretary, the effect of the operations of such mines on commerce is not *sufficiently substantial* to warrant the exercise of jurisdiction * * *, *and the record of injuries and accidents in such class*

Congress established "a single mine safety and health law applicable to the entire mining industry." S. Rep. No. 95-181, 95th Cong., 1st Sess. 13 (1977). The basis for the exercise of federal jurisdiction over sand and gravel mines was the same in 1977 as in 1966. See 30 U.S.C. (Supp. IV) 801(f).[4]

2. Petitioner also contends (Pet. 8-11, 27-32) that the Secretary failed to prove that its mining operations affect commerce and are therefore subject to federal mine safety and health regulation. The short answer to that contention is that no such proof is required. The Act applies to "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce" (30 U.S.C. (Supp. IV) 803). Congress specifically found that the disruption of production and the loss of income to operators and miners caused by accidents in all mines "impede[] and burden[] commerce." 30 U.S.C. (Supp. IV) 801(f). Accordingly, proof that the operations of a particular mine affect commerce is unnecessary. "Where the *class*

---

or category of mines warrants such a declination of jurisdiction." See H.R. Conf. Rep. No. 1921, 89th Cong., 2d Sess. 1 (1966). Contrary to petitioner's argument (Pet. 22 & n.1), however, this provision does not reflect a lack of constitutional power. Congress plainly asserted jurisdiction over the safety practices in mines, including sand and gravel operations, but gave the Secretary authority to *decline* to exercise that jurisdiction.

Section 3(b) was prompted by concern as to the effect the bill's inspection and mandatory reporting requirements might have on "small mine operators, *including* sand, gravel, and crushed stone operations which often employ a few persons and whose operation is often of short duration." S. Rep. No. 1296, *supra*, at 7 (emphasis added). Petitioner has 140 employees (ALJD 2).

[4]"Since the Mine Safety and Health Act * * * is narrowly and explicitly directed at inherently dangerous industrial activity, the inclusion of stone quarries in the statute is presumptively equivalent to a finding that the stone quarrying industry is inherently dangerous." *Donovan* v. *Dewey*, *supra*, 452 U.S. at 602 n.7.

of activities is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez* v. *United States, supra*, 402 U.S. at 154, quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 193 (1968). See *Hodel* v. *Virginia Surface Mining & Reclamation Association, supra*, 452 U.S. at 277.

In any event, the administrative law judge correctly concluded that petitioner's mining operations affect commerce (ALJD 2). It is settled that production of goods may affect commerce though none of the goods is transported out-of-state. See, *e.g., Wickard* v. *Filburn, supra*; *Marshall* v. *Kraynak*, 604 F. 2d 231, 232 (3d Cir. 1979), cert. denied, 444 U.S. 1014 (1980) (intrastate sales of coal); *Secretary of Interior* v. *Shingara*, 418 F. Supp. 693, 694-695 (M.D. Pa. 1976), aff'd, 594 F. 2d 855 (3d Cir. 1979). Nonetheless, petitioner maintains that absent evidence that its intrastate sales satisfied a market that would otherwise be satisfied by out-of-state suppliers, there is no basis for the conclusion that petitioner's operations affect commerce. There is no barrier to interstate shipment of sand, gravel, or cement. Even if none of petitioner's customers currently buys these products from out-of-state suppliers, there is no reason to assume that they will not do so in the future. The administrative law judge reasonably inferred that out-of-state suppliers compete with petitioner and other Texas suppliers. Petitioner has suggested nothing to undermine the reasonableness of that inference. Moreover, petitioner's use of the facilities of interstate commerce to deliver its products within the State of Texas is itself sufficient to support application of the Act.[5]

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[5]In addition, of course, petitioner has 140 employees whose ability to purchase goods that move in commerce depends on petitioner's operations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

T. TIMOTHY RYAN, JR.
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Department of Labor

AUGUST 1982

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